

38-285

Supreme Court, U.S.

FILED

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JOSEPH E. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1987

—o—

PACINDAT MUTUAL PROTECTION &
INDEMNITY ASSOCIATION, LTD.

Petitioner,

Versus

TRAVELERS INDEMNITY COMPANY

—o—

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

—o—

**PETITION FOR WRIT OF CERTIORARI ON
BEHALF OF PACINDAT MUTUAL PROTECTION
& INDEMNITY ASSOCIATION, LTD.**

—o—

BENJAMIN W. YANCEY
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THE QUESTIONS PRESENTED FOR REVIEW REASONS FOR GRANTING WRIT

The reasons which petitioner submits as requiring the granting of certiorari in the present case are that, although petitioner duly raised in its answer, under Rule 12(b) F.R.C.P., the lack of jurisdiction over its person, which put upon plaintiff throughout the whole case the burden to prove facts sustaining jurisdiction, plaintiff submitted no single shred of evidence to sustain jurisdiction. Notwithstanding this, the Circuit Court of Appeals below affirmed jurisdiction, without even considering the complete lack of jurisdiction over the person. It did this on a completely unsupported and unargued theory of "waiver" by petitioner, when there had been no waiver of any kind, express or implied.

A review by this Court is required in order to rectify the unconstitutional action of the Fifth Circuit in subjecting to personal jurisdiction of the district court a foreign entity, without a shred of evidence of "due process" or "minimum contacts".

This action of the Court of Appeals raises the following questions:

(a) Whether a United States District Court may constitutionally exercise personal jurisdiction over a foreign defendant by the plaintiff's serving a complaint by mail, under a state "Long Arm" statute, without a vestige of proof of any of the elements necessary to show that the exercise of jurisdiction would satisfy the requirements of federal due process; lack of jurisdiction having been properly raised by the defendant in its answer, and

plaintiff having submitted no syllable of proof of any activity whatsoever of that defendant in the jurisdiction.

(b) Whether a service of federal process, purportedly made according to state law, but invalid under that state law when made, may be made valid by a subsequent legislative amendment to the state law, the amendment expressly providing exercise of personal jurisdiction "on any basis consistent with . . . the Constitution of the United States", but where, in the litigation, no effort was pretended to have been made to show facts of any sort justifying jurisdiction.

(c) Whether the constitutional requirements of "due process" and "minimum contacts" can be disregarded by the Court of Appeal entirely on its own, on a theory that they have been "waived", where there has been no discussion of "waiver" by the parties, no opportunity given to the allegedly "waiving" party to answer the charge, and actually no "waiver" express or implied.

LIST OF PARTIES

The parties to this proceeding are:

PACINDAT MUTUAL PROTECTION & INDEMNITY
ASSOCIATION, LTD.,

Petitioner,

and

TRAVELERS INDEMNITY COMPANY,

Respondent.

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- (a) Comments of the District Judge from the bench at the conclusion of trial—not transcribed or officially reported.
- (b) Judgment of the District Court, November 24, 1986—found in Appendix I hereto, p. App. 7.
- (c) Opinion of the Fifth Circuit Court of Appeals in *Travelers Indemnity Co. v. Atlantic Express Line, et al*, 837 F.2d 187 (1988)—found in Appendix E hereto, p. App. 9.
- (d) Denial of Rehearing by the Fifth Circuit Court of Appeals in *Travelers Indemnity Co. v. Atlantic Express Line, et al*, 846 F.2d 7 (1988)—found in Appendix F hereto, p. App. 15.

GROUNDS OF JURISDICTION OF THE COURT

1. Date of judgment sought to be reviewed: Original Judgment of Court of Appeals, February 8, 1988
2. Rehearing Denied: May 16, 1988
3. Statutory provision conferring jurisdiction of this Court by writ of certiorari: 28 USC 1254

STATUTES INVOLVED

(A.) Louisiana Long Arm Statute, Louisiana R.S. 13:3201

Appendix A—page App. 1.

(B.) 1987 Amendment to Louisiana Long Arm Statute, Louisiana R.S. 13:3201(B)

Appendix B—page App. 3.

(C.) Louisiana Insurance Code, Louisiana R.S. 22:1253

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STATEMENT OF THE CASE

This litigation originated in a suit, in admiralty, by Travelers Indemnity Company, a cargo underwriter subrogated to the claim of its assured, for damage to cargo shipped from New Orleans to Belize, aboard the motor vessel FREEPORT EXPRESS, against those concerned in the vessel's operation. Those parties apparently having become insolvent, Travelers amended to join Pacindat, underwriter of the M/V FREEPORT EXPRESS, as a direct defendant on its insurance contract. Travelers made "service" of this amended complaint solely by certified mail, under the Louisiana "Long Arm" Statute, LSA-R.S.13:3201, et seq. No other service was attempted.

When made, this service was invalid under Louisiana law as to the foreign or alien underwriter.

In its answer, Pacindat denied the court's jurisdiction over its person. On trial, the district court held, obviously quite incorrectly as of that time, that service under the Louisiana Long Arm Statute was proper, and then proceeded to hold Pacindat liable to Travelers on its policy of insurance for damage to the shipments.

Notwithstanding the fact that Pacindat had in its answer not only attacked the service or process, but also

raised lack of jurisdiction, Travelers, plaintiff, did not produce a syllable of evidence to establish a single fact to prove the elements necessary to make this foreign insurer amenable to personal jurisdiction.

It will be shown later that this holding was erroneous under then existing Louisiana law as exemplified by a ruling of the United States District Court for the Eastern District of Louisiana in 1977, and a holding of the Louisiana Court of Appeal for the Fourth Circuit in 1987.

In 1987 (effective September 1, 1987) the Louisiana legislature amended the state's Long Arm Statute to add a proviso that the Louisiana courts might threafter exercise personal jurisdiction over a non-resident "on any basis consistent with the . . . Constitution of the United States".

When this amendment went into force, it had the effect of inserting a provision for service by mail, which provision did not exist when this suit was filed, which became effective only long after service had been attempted, which did not exist when the case was tried, which did not exist when the trial court's judgment was entered, and which did not exist until after the case had been briefed in the Court of Appeals for the Fifth Circuit.

Then, after the case at bar had been argued and submitted to the Fifth Circuit, the Louisiana Supreme Court, November 30, 1987, held that the amendment to the Long Arm Statute permitted the use of the Long Arm Statute (service by mail, that used here) against alien underwriters provided that "due process" and "minimum contacts", existed.

As soon as the decision of the Supreme Court of the state came to attention of counsel for petitioner, it was reported by them to the Court of Appeals, this present case then still being under submission in that court.

On February 8, 1988, the Court of Appeals rendered the decision here complained of, and denied rehearing on May 16, 1988.

ARGUMENT

Under the Louisiana law as it stood when the amended complaint joining Pacindat as a defendant in this litigation was served, the Louisiana Long Arm Statute (which was the vehicle used by Travelers) did not provide a proper vehicle for serving of process on an alien insurer. The alien insurer who was "transacting business" in the state was covered by the Louisiana Insurance Code, Title 22. If the alien insurer was not "transacting business" as defined in the Code, it was not subject to service of any process. The state Insurance Code, La. R.S. 22:1249, listed the definitions of "transacting an insurance business", and the transacting of business subjected the alien insurer to service on the Secretary of State of Louisiana; NOT to service by mail.

Travelers in this case did not proceed under the Insurance Code nor comply with it. Instead, it proceeded in an attempt to effect service under the Long Arm Statute, i.e., by mail, La. R.S. 13:3201 et seq. That method of service was held not to be available as against an alien

insurer who, rather, was to be served under the Insurance Code and had to be served through the Secretary of State.

This was made plain by then District (now Circuit) Judge Rubin in *McKeithen vs. S/S FROSTA*, 435 F2d 572 (EDLa 1977) at 576, where he commented that the Long Arm Statute, La. R.S. 13:3201, "does not apply to suits on insurance contracts but relates to causes of action arising from a non-resident's transacting business in the state, committing a tort in the state, or similar conduct."

The Louisiana Court of Appeal, Fourth Circuit reached the same conclusion in *First Guaranty Bank of Hammond vs. Attorney's Liability Assurance Society, Ltd.*, 506 So.2d 595 (La. Ap. 1987) where it held unequivocally, at 596, that "personal jurisdiction" over non-resident insurers is governed by the Insurance Code, R.S. 22:1 et seq.

Travelers, in this litigation, did not attempt to serve its complaint on the Secretary of the State of Louisiana under the Insurance Code but proceeded under the Long Arm Statute, La. R.S. 13:3201 et seq. by mail, which, at the time of that attempted service, did not apply.

The 1987 session of the Louisiana Legislature amended the Long Arm Statute, La. R.S. 13:3201 et seq, by adding a new section, to become effective September 1, 1987, to provide that "a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with . . . the Constitution of the United States."

On November 30, 1987, while this case was actually still under submission in the Court of Appeals, the Louisiana Supreme Court considered the effect of this amend-

ment of the Long Arm Statute on the *First Guaranty Bank of Hammond*, supra, and reversed the Louisiana Court of Appeal, Fourth Circuit, 515 So.2d 1018.

The present case being still under submission in the Court of Appeals, as soon as we became cognizant of the reversal of *First Guaranty Bank of Hammond*, we reported that reversal to the Court of Appeals by letter, see appendix, attaching a copy of the Louisiana Supreme Court's decision. In our communication to the Court of Appeals, we made the following comment:

Second, and perhaps even more decisive, even in its new and expanded form, the Louisiana Long Arm Statute still requires proof of jurisdictional contacts. Despite Pacindat's challenge, no evidence of any sort whatsoever was introduced on the subject of jurisdictional contacts. The record is completely empty on this point. This is a fatal defect which cannot now be cured.

Less than three weeks after our calling the *First Guaranty Bank* reversal to its attention, the court below affirmed the judgment, February 8, 1988, on the basis—we submit, wholly untenable—of alleged “waiver”.

In its reversal of the *First Guaranty Bank of Hammond*, the Supreme Court of Louisiana, 515 So.2d 1080 at 1083, said:

The addition of subsection B makes other statutes, like La. R.S. 22:1253 (a) that assert personal jurisdiction over non-residents unnecessary. ‘Now, under the express wording of the present Louisiana Long-Arm Statute, the sole inquiry into jurisdiction over a non-resident is a one-step analysis of the constitutional due process requirements.’

That "sole inquiry", "a one-step analysis of the constitutional due process requirements" is precisely the step the Court of Appeals in the present case refused to take, on the theory of "waiver".

The suggestion that Travelers' obligation, throughout the case from beginning to end, to prove jurisdiction was somehow "waived" came into the case not from Travelers but from the Court of Appeals entirely on its own with no opportunity to Pacindat to refute it except by petition for rehearing.

In its answer, Pacindat contested the court's jurisdiction over its person. The pre-trial order in the district court expressly stated the "Jurisdiction and service of process are disputed by Pacindat", and a similar reference to the validity of service of process as a contested issue of law was handwritten later in the pretrial order and initialed by counsel for both parties. The issue was clearly stated by Pacindat in the Court of Appeals as: was the District Court correct in ruling that jurisdiction had been obtained over the person of Pacindat. Validity of service of process was never abandoned and remained an issue throughout the litigation. When petitioner called to the Circuit Court's attention the change made in Louisiana law by the state Supreme Court in *First Guaranty Bank of Hammond, supra*, before the decision by the Circuit Court of Appeals, it expressly called attention to the fact that the new Louisiana law still required proof of jurisdictional contacts and that no evidence of any sort whatever had been introduced on jurisdictional contacts.

Was this waiver?

The "waiver" is based on the fact that Pacindat is said not to have discussed the point in brief or in oral argument.

Passing the point that, at the time when it was actually effected, the service of process was defective, nothing whatsoever which petitioner did or did not do, could possibly be construed to constitute a waiver. There is no hint of the intentional or voluntary relinquishment of a known right, or the doing of anything inconsistent with the right. There is no hint of any express waiver. As for implied waiver, there is no hint that the other party, Travelers, was induced, by anything which Pacindat did or failed to do, to act upon the belief that there had been a waiver, or to incur trouble or expense thereby, *Waiver*, Black's Law Dictionary, 5th Ed., 1979 (West). To the contrary, Travelers' original brief in the Circuit Court of Appeals, knowing the fatal deficiency of its case on jurisdiction, expatiated at length on the constitutional requirements of "due process" and "minimum contacts", but its references to them were completely unsupported by any evidence whatsoever. As has already been said, the record is completely void of any evidence on this vital point, on which the burden of proof, to the very end, was Travelers'.

The decision here is in conflict with the Fifth Circuit's own decision in *Travelers Indemnity Company v. Calvert Fire Insurance Company*, 798 F.2d 826 (1986), where it is stated, at p.831, that "when a nonresident defendant questions a federal district court's jurisdiction over it, the plaintiff asserting jurisdiction has the burden of proving that the court has jurisdiction of the defendant", and that

"whatever degree of proof is required initially, a plaintiff must have proved by the end of trial the jurisdictional facts by a preponderance of the evidence". Travelers made no pretense of any such proof of. The Circuit Court of Appeals sought to supply that deficiency by the "waiver" theory.

CONCLUSION

Petitioner properly raised the jurisdictional question by answer. Under the then Louisiana law, this brought into question the impropriety of the service which was then invalid, but it also raised the constitutional question of "due process" and "minimum contacts". *First Guaranty Bank of Hammond* possibly validated this service, if a tardy change in state law can breathe life into a dead federal service, which we submit it cannot; but the change in state law very expressly reserved the constitutional questions of "due process" and "minimum contacts". These the Circuit Court of Appeals disregarded.

It is submitted that a writ should issue to correct this error, and to bring this case into consonance with the universally recognized law on the constitutional questions of "due process" and "minimum contacts".

Respectfully submitted,

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APPENDIX A

(A) Louisiana Long Arm Statute, Louisiana R.S. 13:3201

(In form existing prior to 1987)

A court may exercise personal jurisdiction over a non-resident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:

- (1) Transacting any business in this state.
- (2) Contracting to supply services or things in this state.
- (3) Causing injury or damage by an offense or quasi-offense committed through an act or omission in this state.
- (4) Causing injury or damage in this state by an offense or quasi-offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives revenue from goods used or consumed or services rendered in this state.
- (5) Having an interest in, using or possessing a real right on immovable property in this state.
- (6) Non-support of a child or a former spouse domiciled in this state to whom an obligation of support is owed and with whom the nonresident formerly resided in this state.
- (7) Parentage and support of a child who was conceived by the nonresident while he resided in or was in this state.

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(8) Manufacturing of a product or component thereof which caused damage or injury in this state, if at the time of placing the product into the stream of commerce, the manufacturer could have foreseen, realized, expected, or anticipated that the product may eventually be found in this state by reason of its nature and the manufacturer's marketing practices.

APPENDIX B

(B) Added by 1987 Amendment to Louisiana Long Arm Statute, Louisiana R.S. 13:3201(B)

B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

APPENDIX C

(C) Louisiana Insurance Code, Louisiana R.S. 22:1253

A. The transacting of business in this state by a foreign or alien insurer without a certificate of authority is equivalent to an appointment by such insurer of the Secretary of State and his successor or successors in office to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding maintained by the commissioner of insurance or arising out of such policy or contract of insurance, and the said transacting of business by such insurer is a signification of its agreement that any such service of process is of the same legal force and validity as personal service of process in this state upon it.

B. Such service of process shall be made by delivering and leaving with the secretary of state or with some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed by law. The secretary of state shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post-office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff's attorney showing a compliance herewith are

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filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow. However, no plaintiff or complainant shall be entitled to a judgment by default, or a judgment with leave to prove damages, or a judgment pro confesso under this Section until the expiration of thirty days from date of the filing of the affidavit of compliance.

C. Service of process in any such action, suit or proceeding shall in addition to the manner provided in Sub-section B of this Section be valid if served upon any person within this state who, in this state on behalf of such insurer, is

- (1) Soliciting insurance, or
- (2) Making any contract of insurance or issuing or delivering any policies or written contracts of insurance, or
- (3) Collecting or receiving any premium for insurance; and a copy of such process is sent within ten days thereafter by registered mail by the plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the postoffice with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

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D. Nothing in this Section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

APPENDIX D

(D) Judgment of District Court, November 24, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TRAVELERS INDEMNITY
VERSUS
ATLANTIC EXPRESS LINE,
et als.
• CIVIL ACTION
• NO. 85-1545
• SECTION
• "F"(4)

JUDGMENT

(Filed November 26, 1986)

This action came on for trial before the Court without a jury. The Honorable Martin L. C. Feldman, District Judge presiding, considering the facts and law applicable thereto and the issues having been duly tried, and a decision having been duly rendered and oral reasons given on October 30, 1986:

IT IS ORDERED, ADJUDGED AND DECREED
that there be judgment herein in favor of Travelers In-
demnity Company and against Pacindat Mutual Protec-
tion & Indemnity Association Limited as insurer of the
M/V FREEPORT EXPRESS, her owners and/or opera-
tors in the amount of Fifty-Six Thousand, Seven Hundred
Thirty-Eight and 01/100 (\$56,738.01) Dollars, together
with costs and legal interest calculated at 5.79% per
annum, the U.S. Treasury Bill rate posted as of October

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29, 1986, interest to be calculated from the dates of the following losses, with a credit of \$20,000 representing a \$5,000.00 deductible on each of the four losses.

Date of Entry Nov. 26, 1986

<u>DATE OF DAMAGE</u>	<u>AMOUNT OF DAMAGE</u>
April 14, 1984	\$11,133.93
May 13, 1984	\$13,927.62
June 28, 1984	\$18,635.20
July 28, 1984	\$13,041.26

New Orleans, Louisiana this 24th day of November,
1986.

/s/ Martin L. C. Feldman
HONORABLE MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

APPENDIX E

(E) Opinion of Court of Appeals, February 8, 1988

TRAVELERS INDEMNITY CO.,
Plaintiff-Appellee,

v.

ATLANTIC EXPRESS LINE, et
al., Defendants,

Pacindat Mutual Protection &
Indemnity Association, Ltd.,
Defendant-Appellant.

No. 86-3927.

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1988.

Appeal from the United States District Court for the
Eastern District of Louisiana.

Before REAVLEY, WILLIAMS and HIGGIN-
BOTHAM, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal challenges the exercise by the district court of personal jurisdiction over an alien insurance company. We are asked to decide whether Louisiana law provides for service of process by mail upon a defendant insurance company at its corporate headquarters in Bermuda. With *First Guaranty Bank v. Attorney's Liability Assurance Society, Ltd.*, 515 So.2d 1080 (La.1987), the Louisiana Supreme Court effectively settled this issue. Hence we affirm the district court's finding of adequate service of process. Ordinarily we would then proceed to

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the issue of whether Louisiana's exercise of personal jurisdiction over Pacindat Mutual Protection & Indemnity Association, Ltd. ("Pacindat"), the alien insurer, satisfies federal due process requirements. Appellants raised the due process issue at trial but did not "get to it" during trial. The issue was not raised by appellant either in its brief or oral argument on appeal. Consequently, any due process claim based upon a lack of minimum contacts has been waived. Fed.R.App.P. § 28(a)(4); *In re Texas Mortgage Services Corp.*, 761 F.2d 1068, 1073 (5th Cir.1985).

I.

This action was brought to recover cargo damages and shortages pursuant to various clean bills of lading which incorporated by reference The Carriage of Goods by Sea Act (COGSA) 46 U.S.C. § 1300, *et seq.* Five shipments of lard were shipped from New Orleans, Louisiana to Belize City, Belize Central America, in 1983-84 on the M/V FREEPORT EXPRESS owned by Atlantic Express Line ("Atlantic") and Terra Marine Agencies ("Terra"). The lard arrived in bad order. Travelers Indemnity Co. ("Travelers"), the subrogated cargo underwriter, sued Pacindat, underwriter for the M/V FREEPORT EXPRESS, as a direct defendant on its insurance policy.¹

1. Travelers initially sued Atlantic and Terra. Both were insolvent and neither filed responsive pleadings, so the district court dismissed them. Travelers joined as defendants Through Transport Mutual Insurance Association, Ltd. as the liability underwriter of Atlantic and Terra. Travelers also joined as defendant's Pacindat (P & I) Management Ltd. as the protection and indemnity underwriter of Atlantic and Terra. Both Through Transport Mutual Insurance Association and Pacindat (P & I) Management, Ltd. were voluntarily dismissed from this suit for reasons which do not appear in the record.

Travelers served mail process on Pacindat at its corporate headquarters in Hamilton, Bermuda, pursuant to the Louisiana Long-Arm Statute, La.Rev.Stat.Ann. 13:3201 *et seq.* (West 1978).

Pacindat timely opposed the exercise of Louisiana's jurisdiction over it. After a pretrial conference, the district judge found personal jurisdiction and service of process on Pacindat to be proper. The district court held a bench trial finding Pacindat liable as an underwriter for negligent stowing and mishandling of the lard. Travelers was awarded \$56,738.01, together with costs and legal interest, with a credit of \$20,000 representing a \$5,000 insurance policy deductible on each of the losses being applied. Pacindat appeals claiming service of process was improper as failing to comply with the Louisiana Insurance Code, La.Rev.Stat.Ann. 22:1253 A (West 1978).

II.

The issue of personal jurisdiction involves a dual inquiry into (1) proper service of process under Fed.R.Civ. P. 4 and relevant state law provisions, and (2) federal constitutional due process considerations described in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and the line of cases that has followed.² Appellant's entire argument is limited, however,

2. E.g., *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.E.2d 490 (1980); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

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to the claim that service of process on Pacindat by Travelers was improper. Hence we consider only that aspect of Louisiana's exercise of personal jurisdiction over Pacindat.

Pacindat is a protection and indemnity insurer incorporated and located in Bermuda. It contracted with Atlantic to insure cargo shipped aboard the M/V FREEPORT EXPRESS. Louisiana has a direct action statute under which an insurer may be sued directly, rather than indirectly through the insured. La.Rev.Stat.Ann. 22:655 (West 1978). Travelers sued Pacindat under this statute. Pacindat claims the method of service of process in direct actions must conform with that set out in the Louisiana Insurance Code. The Code in terms provides for an alien insurer to be served with process through the Secretary of State. La.Rev.Stat.Ann. 22:1253 (A) (West 1978). Pacindat claims that this method excludes other forms of service under Louisiana law. Travelers counters by urging that § 1253 (D) provides for service by "any other method"³ and that Louisiana Long-Arm provisions specifically allow service of process by mail.⁴

3. La.Rev.Stat.Ann. 22:1253 D states:

D. Nothing in this Section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

4. La.Rev.Ann. 13:3204, states:

A certified copy of the citation and of the petition in a suit under R.S. 13:3201 [the Louisiana Long Arm Statute] shall be sent by counsel for the plaintiff to the defendant by registered or certified mail, or actually delivered to the defen-

(Continued on following page)

The Supreme Court of Louisiana has effectively resolved the service of process issue posed by the parties. The case is *First Guaranty Bank v. Attorney's Liability Assurance Society, Ltd.*, 515 So.2d 1080 (La.1987). In *First Guaranty*, a legal malpractice action, the plaintiff sued the defendants' insurer under Louisiana's direct action statute, just as the plaintiff in this case sued Pacindat. Unlike this case, however, the plaintiff in *First Guaranty* served process on the insurer using the procedures set forth in the Louisiana direct action statute, by forwarding a copy of the complaint to the Secretary of State as agent for the insurer. The insurer challenged personal jurisdiction, arguing that it had not been "transacting business" in the state, a prerequisite to use of the direct action statute.

The Louisiana Supreme Court ruled that the state's long-arm statute, which permits jurisdiction to the constitutional limits of due process, supercedes the direct action statute; in other words, an insurer subject to jurisdiction under the long-arm statute need not also be subject to jurisdiction under the direct action statute. Although the issue in *First Guaranty* was due process, and not service of process, the case carries the strong implication that the procedures under the long-arm statute may

(Continued from previous page)

dant by an individual designated by the court in which the suit is filed, or by one authorized by the law of the place where the service is made to serve the process of any of its courts of general jurisdiction.

Service of process so made has the same legal force and validity as personal service on the defendant in this state.

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be used instead of the procedures provided by the direct action statute.⁵

We follow *First Guaranty*; jurisdiction over Pacindat is governed by the Louisiana Long Arm Statute which provides for service of process by mail. We hold that Travelers properly served process upon Pacindat by mailing a copy of the complaint to Pacindat's office in Bermuda.

AFFIRMED.

5. "The addition of Subsection B [extending long-arm jurisdiction to the limits of due process] makes other statutes (like R.S. 22:1253(A)) that assert personal jurisdiction over a non-resident defendant unnecessary." *First Guaranty, supra*, 515 So.2d at 1083 (R.S. 22:1253(A) is the provision of the direct action statute that provides for service of process upon a non-resident insurer through the Secretary of State).

APPENDIX F

**(F) Opinion of Court of Appeals denying rehearing,
May 16, 1988**

TRAVELERS INDEMNITY COMPANY,

Plaintiff-Appellee,

v.

ATLANTIC EXPRESS LINE, et al.,

Defendants,

**Pacindat Mutual Protection & Indemnity
Association, Ltd.
Defendant-Appellant.**

No. 86-3927.

**United States Court of Appeals,
Fifth Circuit.**

May 16, 1988.

**Appeal from the United States District Court for the
Eastern District of Louisiana; Martin L.C. Feldman,
Judge.**

ON PETITION FOR REHEARING

**Before REAVLEY, WILLIAMS and HIGGIN-
BOTHAM, Circuit Judges.**

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **DENIED**.

In its motion for rehearing Pacindat Mutual Protection & Indemnity Association, Ltd., raises two issues. The

first is that in upholding the service of process under the Louisiana longarm statute, we relied upon a case which had been decided after service was accomplished. A reading of our opinion in this case reveals that we did not rely upon the case in question. We simply stated that the case had settled the issue in Louisiana in conformance with what we had already held which was that service by mail was authorized in Louisiana.

The second claim is that the assertion of personal jurisdiction over the alien petitioner violates federal due process requirements. We held that petitioner had waived any claim of lack of minimum contacts to meet due process ing, the trial judge sustained the exception of lack of jur-makes clear that they stated only one issue and the entire argument was based upon service of process under the Louisiana longarm statute. It is true that they cited a ease, *Travelers Indemnity Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826 (5th Cir.1986), which does involve the due process contacts issue. They did not cite it for the purpose, how-ever, of raising minimum contacts compliance with due process. Not one mention of that issue is found in peti-tioner's original brief or reply brief before this Court. We properly held that the issue, if it had been raised in the trial court, was waived.

APPENDIX G

(G) Opinion of Louisiana Court of Appeal in First Guaranty Bank of Hammond, April 9, 1987

**FIRST GUARANTY BANK OF
HAMMOND**

v.

ATTORNEYS' LIABILITY ASSURANCE
SOCIETY, LTD. and Jones, Walker,
Waechter, Poitevent, Carrere & Denegre.

No. CA-6795.

Court of Appeal of Louisiana,
Fourth Circuit.

April 9, 1987.

Before KLEES and ARMSTRONG, JJ., and
HUFFT, J., pro tem.

KLEES, Judge.

Plaintiff appeals the granting of an exception to the in personam jurisdiction of the district court urged by defendant Attorneys' Liability Assurance Society, Ltd. ["ALAS"]. We affirm.

Plaintiff, First Guaranty Bank of Hammond, brought this suit against the law firm of Jones, Walker, Waechter, Poitevent, Carrera & Denegre ["Jones, Walker"] alleging legal malpractice. Also made a defendant was ALAS, the professional liability insurance carrier for Jones, Walker.

ALAS, which is based in Bermuda, is a non-resident insurer. Although the Louisiana direct action statute, R.S. 22:655, gives plaintiff a right of action against ALAS,

an independent basis of personal jurisdiction is necessary in order for ALAS to be sued in this state. *Jones v. M.F.A. Mutual Ins. Co.*, 398 So.2d 10 (La.App. 3rd Cir. 1981), *writ denied*, 399 So.2d 586 (La.1981).

Personal jurisdiction over non-resident insurers is governed by the Insurance Code, R.S. 22:1 et seq. Since ALAS does not have a certificate of authority from the Louisiana Commissioner of Insurance, the particular provisions applicable to it are to be found in Part XXVII (Sections 1249-71) of the Code, entitled "Unauthorized Insurance". With regard to service of process, section 1253(A) provides that the "transacting of business" in this state by a foreign or alien unauthorized insurer is equivalent to the appointment by the insurer of the Secretary of State as its agent for service of process. Relying on this provision, plaintiff served ALAS through the Secretary of State using the procedure outlined in section 1253(B).

The exception filed by ALAS alleged that the service was invalid because ALAS was not "transacting business" in the state within the meaning of R.S. 22:1253, and in the alternative, because the exercise of personal jurisdiction over ALAS by a Louisiana court would be unconstitutional. The trial court maintained the exception without giving written reasons. After reviewing the evidence, we find that the exception was properly maintained because ALAS's actions in Louisiana do not constitute the transaction of business as defined by the Insurance Code.

The terms "transacting business" as used in R.S. 22:1253 is clearly defined in 22:1249, which reads:

§ 1249. Transacting a business of insurance by unauthorized insurer defined

A. Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign alien insurer is defined to be transacting an insurance business in this state:

- (1) The making of or proposing to make, as an insurer, an insurance contract.
- (2) The solicitation, taking or receiving of any application for insurance contract.
- (3) The receiving or collection of any premiums, membership fees, assessment, dues or other considerations for any insurance contract.
- (4) The issuance or delivery of contracts of insurance to residents of this state or to corporations or persons authorized to do business in this state.
- (5) The transaction of any matter subsequent to the execution of such a contract and arising out of it.
- (6) The doing or proposing to do any insurance business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of the insurance laws of this state.

(B) This section shall not apply to:

- (8) Transactions involving risks located in this state where the policy or contract of insurance for such risk was principally negotiated and delivered outside this state, and was lawfully issued in a state or foreign country in which the foreign or alien insurer was authorized to do an insurance business, and where such insurer has no contact with this state except in connection with inspections or losses required by virtue of the contract or policy of insurance covering the risk located in this state.

Upon reviewing the facts in this case, which are not in dispute, we conclude that the exception in part 8 of section 1249(B) clearly applies to ALAS, and therefore, the activities of ALAS in Louisiana do not constitute the transaction of business as defined by the legislature.

ALAS is a mutual insurance society which was organized under the laws of Bermuda and has its corporate offices there. All of its members are law firms with forty or more attorneys, who operate as a mutual club. ALAS was founded in 1979 in response to a study by Marsh & McLennan which showed the potential cost effectiveness of this type of professional liability coverage for medium-to-large sized law firms. Jones, Walker was one of ALAS's founding members. Mr. Robert Acomb, a partner at Jones, Walker who has handled the firm's professional liability insurance since 1974, testified in his deposition that he made the initial contact with the Bermuda law firm that was organizing ALAS, and was sent an application. The application was filled out by Jones, Walker in New Orleans and returned to Bermuda by means of a Maryland courier service. When ALAS obtained commitments from thirty-five firms, the society was chartered, and Jones, Walker's first policy was issued to ALAS's attorneys in Bermuda for subsequent delivery to the firm. Mr. Acomb testified that he took delivery of that first policy, as he has of all subsequent renewals, at the annual meeting of ALAS held in Bermuda (and later at other locations outside the United States). Renewal applications are mailed to New Orleans, completed there, and mailed back to Bermuda. Premium invoices are also mailed to Jones, Walker and the premiums are wired from the firm's bank in New Orleans to ALAS's bank in Bermuda.

ALAS insures three other firms in the New Orleans area, all of which follow virtually the same procedures with regard to completing applications, paying premiums and taking delivery of policies. In 1981, ALAS sent a representative to New Orleans for several days to discuss loss prevention techniques with members of Jones, Walker and the other firms it insures.

In light of these facts, we find that ALAS unquestionably falls within the language of the exception noted in section 1249(B)(8). As provided in the exception, the risk (legal malpractice) is located in Louisiana, but the policy was "principally negotiated and delivered," as well as "lawfully issued" in Bermuda, where ALAS is authorized to do business. We do not agree with plaintiff's argument that the policy was "principally negotiated" in Louisiana merely because the application was filled out in New Orleans. The completion of the application is only one step in the negotiation procedure, and it is the only one that took place in Louisiana, with the initial contact, the drafting of the policy, and the approval of the application all having occurred in Bermuda.

The plaintiff's other argument with regard to section 1249 is that the visit to New Orleans made by the ALAS representative to discuss loss prevention was "the transaction of any matter" subsequent to and arising out of an insurance contract as defined in 1249(A)(5), and therefore constitutes the transaction of business in Louisiana. This contention might be true if it were not for the language of 1249(B)(8), which clearly states that the statute shall not apply in cases where the insurer has no contact with this state "except in connection with inspections or losses

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required by virtue of the contract or policy of insurance covering the risk located in this state." The existence of an insurance contract normally obliges the insurer to periodically inspect or evaluate the risk being covered by that policy. In our opinion, ALAS's review of the loss prevention practices utilized by its insureds falls within the ambit of activities contemplated by the phrase "inspections . . . required by virtue of the contract or policy." Therefore, if the visit to Louisiana by the ALAS representative fits under the exceptions noted in section 1249 (B)(8), as we find that it does, it cannot serve as a basis for establishing jurisdiction under 1249(A)(5). To read the statute otherwise would totally negate the effect of the exception.

Another argument made by plaintiff is that section 1253 can bestow jurisdiction independently of section 1249. This contention is supported by the case of *McKeithen v. M/T Frosta*, 435 F.Supp. 572 (E.D.La.1977), in which a federal district court held that a foreign maritime liability insurer was subject to jurisdiction by virtue of section 1253 even though section 1249 did not apply because the situation fit under the exception noted in 1249(B)(7). The *McKeithen* court, faced with a ferry accident caused by a foreign vessel in Louisiana waters and numerous injured plaintiffs who would have no remedy if the vessel's insurer were not subject to jurisdiction, specifically rejected the argument that the term "transacting business" in section 1253 is limited in its meaning to what is defined as transacting business by section 1249. *Id.* at 577. To this extent, we believe that *McKeithen* is wrong. Article 17 of the Civil Code requires that laws which are *in pari materia*, or on the same subject matter, be construed in

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reference to each other. Section 1253 merely provides that the transaction of business in this state by an unauthorized insurer constitutes the appointment of the Secretary of State as the insurer's agent for service of process. Section 1249, which is in the same part of the Insurance Code, is entitled "Transacting a business of insurance by unauthorized insurer defined." It is inconceivable to us that the legislature intended anything other than that the phrase "transacting business" in section 1253 and wherever else it appears in the part of the Code on unauthorized insurance, be given the exact meaning stated in section 1249.

In conclusion, we find that ALAS is covered by section 1249(B)(8) of the Insurance Code and therefore is not subject to the jurisdiction of a Louisiana court. Accordingly, the district court correctly maintained the exception of lack of personal jurisdiction and dismissed plaintiff's suit as against defendant Attorneys' Liability Assurance Society.

AFFIRMED.

APPENDIX H

(H) **Opinion of Louisiana Supreme Court in First Guaranty Bank of Hammond, November 30, 1987**

FIRST GUARANTY BANK OF HAMMOND

v.

ATTORNEYS LIABILITY ASSURANCE
SOCIETY, LTD., et al.

No. 87-C-1049.

Supreme Court of Louisiana.

Nov. 30, 1987.

MARCUS, Justice.

First Guaranty Bank of Hammond (First Guaranty) filed this suit against the law firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre (Jones Walker) alleging legal malpractice. Attorneys' Liability Assurance Society, Ltd. (ALAS) was also made a defendant as the professional liability insurance carrier for Jones Walker pursuant to Louisiana's Direct Action Statute, La.R.S. 22:655.

ALAS, a mutual insurance society organized under the laws of Bermuda, filed a declinatory exception of lack of jurisdiction over the person of ALAS. La.Code Civ.P. art. 925(5). First Guaranty had relied on La.R.S. 22:1253 (A) as a basis for jurisdiction over the person of ALAS and had served the Secretary of State using the procedure prescribed by section 1253(B). La.R.S. 22:1253(A) provides that the "transacting of business" in this state by an alien insurer without a certificate of authority is equiv-

alent to the insurer appointing the Secretary of State as its agent for service of process. ALAS argued it was not "transacting an insurance business in this state" as defined by La.R.S. 22:1249(A) and that even if it was, its activities were covered by exception eight in Section 1249 (B).¹ Therefore, ALAS argued it could not be served pursuant to La.R.S. 22:1253. ALAS also argued that the assertion of jurisdiction over the person of ALAS by a Louisiana court would violate due process. After a hearing, the trial judge sustained the exception of lack of jurisdiction over the person of ALAS and dismissed First Guaranty's claim against ALAS. The court of appeal affirmed.² It reasoned that personal jurisdiction over nonresident insurers is governed solely by the Insurance Code and that ALAS was not "transacting business" in the state within the meaning of section 1253 because its activities were covered by exception eight in section 1249 (B). As a result, ALAS was not subject to the jurisdiction of the trial court. On First Guaranty's application,

1. La.R.S. 22:1249(B)(8) provides:

B. This section shall not apply to:

(8) Transactions involving risks located in this state where the policy or contract of insurance for such risk was principally negotiated and delivered outside this state, and was lawfully issued in a state or foreign country in which the foreign or alien insurer was authorized to do an insurance business, and where such insurer has no contact with this state except in connection with inspections or losses required by virtue of the contract or policy of insurance covering the risk located in this state.

2. 506 So.2d 595 (La.App. 4th Cir.1987).

we granted certiorari to review the correctness of that decision.³

The sole issue presented for our review is whether the trial court has jurisdiction over the person of ALAS.

In order for a Louisiana court to exercise personal jurisdiction over a non-resident defendant, there must be a state statute that authorizes the court to do so and the exercise of personal jurisdiction over the particular non-resident defendant must not offend the "traditional notions of fair play and substantial justice" embodied in the due process clause of the fourteenth amendment. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *Petroleum Helicopters, Inc. v. AVCO Corporation*, 513 So.2d 1188 (La.1987).

A brief history of Louisiana's long-arm statute is necessary to resolve the issue before us. When Louisiana's long-arm statute, La.R.S. 13:3201, was first enacted in 1964, it provided:

A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's

- (a) transacting any business in this state;
- (b) contracting to supply services or things in this state;
- (c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state;
- (d) causing injury or damage in this state by an offense or quasi offense committed through an act or

3. 508 S.2d 56 (La.1987).

omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; or

(e) having an interest in, using, or possessing a real right or immovable property in this state.

One of the comments of the Louisiana Law Institute in 1964 stated in part:

It was not felt necessary to extend this section to insurance. Under R.S. 22:1253(A), there is an implied appointment of the Secretary of State as the agent for the service of process on any foreign or alien insurer which is not qualified to do business in Louisiana, but which transacts business in this state. . . . [⁴]

Prior to the 1987 amendment, the long-arm statute had been amended several times to add other activities to the list, but nothing was ever added specifically to cover nonresident insurers.⁵ Even though La. R.S. 22:1253(D)

4. La.R.S. 22:1253 had been enacted prior to the enactment of the long-arm statute. Statutes like La.R.S. 22:1253 and the nonresident motorist statute (La.R.S. 13:3474) that use the fiction of implied consent to appoint the Secretary of State as the agent for service of process were very common at that time as a means of exercising jurisdiction over certain nonresident defendants.

5. Prior to the 1987 amendment, the long-arm statute provided:

A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:

(1) Transacting any business in this state.

(Continued on following page)

provides that “[n]othing in this Section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law,” there was arguably no other statute besides 1253(A) that provided for jurisdiction over ALAS until the 1987 amendment to the long-arm statute.

In 1987, the Louisiana Legislature amended La.R.S. 13:3201 (the long-arm statute) by adding the following subsection :

(Continued from previous page)

- (2) Contracting to supply services or things in this state.
- (3) Causing injury or damage by an offense or quasi-offense committed through an act or omission in this state.
- (4) Causing injury or damage in this state by an offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives revenue from goods used or consumed or services rendered in this state.
- (5) Having an interest in, using or possessing a real right on immovable property in this state.
- (6) Non-support of a child or spouse or a former spouse domiciled in this state to whom an obligation of support is owed and with whom the nonresident formerly resided in this state.
- (7) Parentage and support of a child who was conceived by the nonresident while he resided in or was in this state.
- (8) Manufacturing of a product or component thereof which caused damage or injury in this state, if at the time of placing the product into the stream or commerce, the manufacturer could have foreseen, realized, expected, or anticipated that the product may eventually be found in this state by reason of its nature and the manufacturer's marketing practices.

B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.^[6]

The addition of Subsection B makes other statutes (like La.R.S. 22:1253(A)) that assert personal jurisdiction over nonresident defendants unnecessary. "Now, under the express wording of the present Louisiana Long-arm Statute, the sole inquiry into jurisdiction over a nonresident is a one-step analysis of the constitutional due process requirements." *Petroleum Helicopters*, 513 So.2d at 1192. If personal jurisdiction over a particular nonresident defendant meets the constitutional requirements of due process, then the assertion of that jurisdiction by a Louisiana court is authorized under the long-arm statute. Because the long-arm statute pertains to jurisdiction and procedure, it may be applied retroactively. *Petroleum Helicopters*, 513 So.2d 1192; *McBead Drilling Co. v. Kremco, Ltd.*, 509 So.2d 429 (La.1987).

Therefore, the narrow issue before this court is whether the assertion of personal jurisdiction over ALAS by a Louisiana court would offend "traditional notions of fair play and substantial justice" embodied in the due process clause of the fourteenth amendment. *International Shoe*, 326 U.S. 310, 66 S.Ct. 154. Accordingly, it is not necessary to review the court of appeal's determina-

6. The 1987 Comment to La.R.S. 13:3201 reads:

The addition of Subsection (B) to this statute ensures that the long-arm process extends to the limits allowed by due process, while retaining a valuable list of specific examples of contacts sufficient to give rise to *in personam* jurisdiction.

tion that ALAS is not "transacting an insurance business in this state" within the meaning of La.R.S. 22:1249. It is certainly possible for a nonresident insurer to have sufficient "minimum contacts" with Louisiana for purposes of personal jurisdiction and yet not be "transacting the business of insurance in this state" as defined by the Insurance Code.

ALAS is a mutual insurance society organized under the laws of Bermuda. When ALAS was originally formed in 1979, it had 35 member firms nationwide.⁷ Jones Walker was an original member firm and a Jones Walker partner (Mr. Robert B. Acomb, Jr.) has been on the Board of Directors of ALAS since the formation of the company.

In 1979, Jones Walker sent a telex to ALAS in Bermuda requesting information on legal malpractice coverage for the firm. It subsequently received an application for membership from Bermuda. Jones Walker completed the application in New Orleans and sent it back to Bermuda for approval. The procedure for the renewal of Jones Walker's policy, the payment of premiums, and the delivery of the policy has been the same every year since then. A renewal application is sent from Bermuda to New Orleans where it is completed and returned to Bermuda. The yearly premiums are wired from Jones Walker's bank in New Orleans to ALAS's bank in Bermuda and Mr. Acomb picks up Jones Walker's policy at ALAS's annual meeting which is always held outside of the United States. Although ALAS does not directly solicit business

7. In order to be a member, the firm must have at least 40 attorneys. By 1986, ALAS's nation-wide membership had grown to approximately 295 firms.

in Louisiana,⁸ ALAS was the professional liability insurer for four Louisiana firms consisting of more than 300 attorneys in 1984.⁹ The procedures followed by Jones Walker are presumably followed by the other Louisiana member firms because these procedures were the ones that were established when ALAS was originally organized.

In order for the exercise of jurisdiction over ALAS to be constitutionally permissible, ALAS must have sufficient "minimum contacts" with Louisiana so that the exercise of jurisdiction is reasonable and just. ALAS only has to have "minimum contacts" because First Guaranty's cause of action against ALAS "arises out of" or "relates to" ALAS contacts with Louisiana as Jones Walker's insurer.¹⁰ The United States Supreme Court has stated that jurisdiction is proper when the defendant's contacts with the forum are the result of the defendant entering into a contract that has a "substantial connection" with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). The professional indemnity policy in this case has a "substantial connection" with Louisiana. The risk covered by the policy is centered in Louisiana.

8. When a new firm wants to become a member, it must contact ALAS in Bermuda by telephone or by mail.
9. At oral argument, counsel for First Guaranty stated that ALAS presently insures 13 Louisiana firms consisting of more than 600 attorneys.
10. When the cause of action does not "arise out of" or "relate to" the nonresident defendant's contacts with the forum, the defendant's contacts must be of a continuous and systematic" nature. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984).

The assured attorneys are citizens and residents of Louisiana who primarily practice law in Louisiana. ALAS has purposefully accepted and approved Jones Walker's application every year and has created "continuing obligations" between itself and residents of Louisiana. *Burger King*, 471 U.S. at 476, 105 S.Ct. at 2184. Therefore, it cannot be said that the indemnity policy resulted from "the unilateral activity of another party or a third person." *Helicopteros* 466 U.S. at 418, 194 S.Ct. at 1874. Moreover, ALAS's contacts with Louisiana as Jones Walker's insurer are not "fortuitous" or "isolated." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed2d 490 (1980). The contacts are not fortuitous because ALAS purposefully undertook the obligation of being the professional liability insurance carrier for Jones Walker which is and always has been located in Louisiana. The contacts are not isolated because it also insures a number of other Louisiana law firms. ALAS receives substantial premiums from the Louisiana firms. Over the last five years, it has received more than \$540,000 in premiums from Jones Walker alone. Additionally, in 1986, ALAS arranged¹¹ for a Mr. Robert O'Malley to come to New Orleans and meet with the various Louisiana member firms to advise them on means and procedures to reduce the potential of professional liability claims. Mr. O'Malley was in New Orleans between March 31, 1986 and April 4, 1986. Even if Mr. O'Malley had not come to Louisiana, an absence of physical contacts does not automatically pre-

11. Mr. O'Malley is on an annual retainer to ALAS. ALAS refers to Mr. O'Malley as an independent contractor as opposed to an employee or an agent. This distinction is of no merit because he was clearly in New Orleans on behalf of ALAS.

vent personal jurisdiction. The United States Supreme Court recently stated:

Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is being transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there [Citations omitted.]

Burger King, 471 U.S. at 476, 105 S.Ct. at 2184.

The facts of this case warrant our conclusion that ALAS has sufficient minimum contacts in Louisiana to subject it to the jurisdiction of the trial court. The exercise of personal jurisdiction over ALAS by the trial court would be reasonable and just. Although Louisiana's Direct Action Statute does not provide a basis of personal jurisdiction,¹² it does add to the foreseeability that a nonresident insurer will be haled into court in Louisiana. ALAS's connection with Louisiana as the insurer of a large number of Louisiana attorneys is such that ALAS should have reasonably anticipated being haled into court in Louisiana if one of its assured firms was sued for alleged malprac-

12. The Direct Action Statute provides a right of action against the insurance carrier. It is not jurisdictional. "[A]n independent basis of jurisdiction must exist before a nonresident insurer can be sued under the Direct Action Statute." *Jones v. MFA Mutual Insurance Co.*, 398 So.2d 10, 11 (La.App. 3d Cir.1981), writ denied, 399 So.2d 586 (La.1981).

tice. The exercise of jurisdiction over the person of ALAS in this case will not offend "traditional notions of fair play and substantial justice."

DECREE

For the reasons assigned, the judgment of the court of appeal affirming the dismissal of First Guaranty Bank of Hammond's claim against Attorneys' Liability Assurance Society, Ltd. is reversed. Attorneys' Liability Assurance Society's exception of lack of jurisdiction over the person is overruled. The case is remanded to the district court for further proceedings in accordance with law.

WATSON, J., dissents. ALAS has done everything possible to escape personal jurisdiction except to provide malpractice insurance for certain lawyers. This alone does not impose jurisdiction.

APPENDIX I

(I) Counsel's letter of January 21, 1988 to the Clerk, United States Court of Appeals, while this case was under submission

Law Offices
TERRIBERRY, CARROLL & YANCEY
3100 Energy Centre
New Orleans 70163-3100

January 21, 1988

Hon. Gilbert F. Ganuchean,
Clerk
Fifth Circuit Court of Appeals
600 Camp Street
New Orleans, LA 70130

Re: No. 86-3927
Travelers Indemnity Company
v. Atlantic Express Line, et al.
Our File: 25625/WC

Dear Sir:

After this case was submitted following oral argument, certain developments occurred which we should like to bring to the attention of the Court.

On page 3 of the reply brief which we submitted on behalf of the appellant, Pacindat, we cited the decision of the Fourth Circuit Court of Appeal of Louisiana, *First Guaranty Bank of Hammond v. Attorneys' Liability Assurance Society, Ltd., et al.*, 506 So.2d 595, in which the Louisiana Appellate Court ruled ineffective attempted service under the Louisiana Insurance Code on a foreign insurer. The decision was cited to show that under exist-

ing Louisiana jurisprudence, there was in fact no way in which the appellant might properly be served.

Subsequently the Louisiana Supreme Court issued certiorari and in a November 30, 1987 decision, — So.2d —, reversed the Court of Appeal.

A copy of the Louisiana Supreme Court's decision is attached from which it will appear that the reversal was based upon a broadening of the Louisiana Long-Arm Statute by the 1987 Louisiana Legislature. This change was effective September 1, 1987.

We would like to call to the Court's attention that the reversal in *First Guaranty Bank* does not embarrass appellant's position in this appeal. Conceding that Louisiana law, since September 15, 1987, provides a new jurisdictional statute which might possibly apply to Pacindat in the future, it is nevertheless unavailable in this litigation for two undeniable reasons.

First, it is only by virtue of Rule 4 of F.R.C.P. that the Louisiana process procedures are available and that rule, both in Subsection (e)(2)(C)(i) and Subsection (e)(1), borrow state procedure when there is a state law or statute establishing such a procedure. Although the record does not reflect service of any sort on Pacindat, service was in fact attempted under the Long-Arm Statute in January, 1986, more than a year and a half before Louisiana undertook to expand its long-arm jurisdiction. Thus, when service was attempted, there was no available state statute. Even if the 1987 state statute itself were considered to have retroactive effect, that could not satisfy the F.R.C.P. requirement that a state method of service exist when service is attempted. Such a state

method did not exist in January, 1986, so that there was no state method to be used. The fact that a state procedure may later have been established is of no moment.

Second, and perhaps even more decisive, even in its new and expanded form, the Louisiana Long-Arm Statute still requires proof of jurisdictional contacts. Despite Pacindat's challenge, no evidence of any sort whatever was introduced on the subject of jurisdictional contacts. The record is completely empty on this point. This is a fatal defect which cannot now be cured.

It is requested that this letter be called to the attention of the Court and three extra copies are included for that purpose.

Yours very truly,

TERRIBERRY, CARROLL & YANCEY

s/ Walter Carroll, Jr.

BY:

Walter Carroll, Jr.

WCJr/mm
1 & 3
attachment

cc/attachment: Gino J. Rendeiro, Esq.
